Filed 5/9/19 P. v. Vaughn CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

WALLACE VAUGHN et al.,

Defendants and Appellants.

F074750

(Kern Super. Ct. Nos. DF012306A & DF012306B)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Brian M. McNamara, Judge.

James Bisnow, under appointment by the Court of Appeal, for Defendant and Appellant Wallace Vaughn.

Lauren E. Dodge, under appointment by the Court of Appeal, for Defendant and Appellant Terry Richardson.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Galen N. Farris, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendants Richardson and Vaughn were convicted of possessing controlled substances in prison after contraband was found in their joint cell. In the same trial, Richardson was convicted of a second count based on a separate instance of possession in prison.

They raise several challenges to their convictions and to Richardson's sentence. We accept the Attorney General's concession that one of Richardson's "strike" priors must be dismissed, but otherwise reject defendants' claims and affirm.

BACKGROUND

Charges

In an amended information filed October 25, 2016, the Kern County District Attorney charged Richardson and Vaughn with knowing possession of heroin and/or marijuana in prison (count 1; Pen. Code, § 4573.6);[1] and charged Richardson alone with another count of knowingly possessing marijuana in prison (count 2; § 4573.6.) The information alleged Richardson had suffered three prior "strike" convictions (§§ 667, subds. (c)–(j), 1170.12, subds. (a)–(e)) and two prior prison terms (§ 667.5, subd. (b)). The information alleged Vaughn had suffered nine prior "strike" convictions. (§§ 667, subds. (c)–(j), 1170.12, subds. (a)–(e))

Convictions

A jury convicted defendants as charged. In a bifurcated proceeding, the court found all of the enhancement allegations true.

Sentencing

Richardson moved to dismiss two of his "strike" priors under section 1385. (See *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).) !(CT 430)! The court denied the motion.

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[1] All further statutory references are to the Penal Code unless otherwise stated.

On count 1, the court sentenced Richardson to a term of 25 years to life, plus 2 years for the two prior prison term enhancements. On count 2, the court sentenced Richardson to a consecutive term of 25 years to life, plus 2 years for the two prior prison term enhancements.

The court sentenced Vaughn to a term of 25 years to life.

Both defendants' sentences ran consecutive to the terms they were already serving in prison.[2]

FACTS

I. Facts Concerning Count 1 (Against both Defendants)

Raul Hernandez worked as a correctional officer at Kern Valley State Prison. On September 3, 2014, Officer Hernandez searched the cell assigned to Vaughn and Richardson. Vaughn and Richardson were the only individuals in the cell. Vaughn and Richardson were near the front of the cell, and Hernandez observed Richardson move behind Vaughn. Vaughn and Richardson were escorted out of the cell for the search.

During the search, Officer Hernandez located a cell phone and three bindles on top of a lower locker in the cell. Hernandez labeled the bindles RH02, RH6, and RH7. The cell phone was within about one inch of one of the bindles.

In the right side of an upper locker, Officer Hernandez located two more bindles; he labeled them RH08 and RH09. In the left side of the upper locker, Hernandez found another bindle and labeled it RH03. In the lower left locker, Hernandez found another bindle and labeled it RH05. Another bindle was found on the floor.

Officer Hernandez believed RH02 contained heroin. An on-site field test yielded a presumptive positive for heroin. Subsequent testing confirmed the results.

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[2] Richardson and the Attorney General state that the sentence Richardson was already serving was a 48-year-to-life term.

Officer Hernandez believed bindles RH03 through RH09 all contained marijuana. On-site field tests yielded a presumptive positive for marijuana in all seven samples. A subsequent examination indicated that RH03 through RH09 all contained the same substance, and a microscopic examination of the substance in RH05 indicated it was marijuana.

After the search, Officer Hernandez went to where Richardson and Vaughn had been taken. Hernandez told them a cell phone and bindles of suspected marijuana had been found in their cell. Richardson said the marijuana was his. Vaughn said the cell phone was his.

II. Facts Concerning Count 2 (Against Richardson Only)

On May 24, 2015, Correctional Sergeant John Melvin was working at Kern Valley State Prison. Around 1:15 p.m. that day, Melvin was supervising visits between inmates and their visitors. Melvin watched monitors recording the visiting room. Melvin saw Richardson with his hand inside his pants. Another officer described Richardson as "making movements like towards his rectal cavity." Melvin approached Richardson and asked if he had any contraband. Richardson just looked at Melvin and smiled. Melvin asked Richardson if he was going to hand over the contraband or be placed on contraband watch. (Contraband watch is when an inmate's arms, legs and waistband are taped up[3], and the inmate is constantly monitored so that contraband can be retrieved, "be it voluntarily or through bowel movement.") Richardson replied, "I'm just going to ride it out Serg."

Correctional Officer Rigoberto Estrada escorted Richardson to an "inmate strip down room." Estrada asked for the contraband and again Richardson said he was going to "ride it out." Correctional Officer Manuel Ortiz was assigned to contraband watch of

[3] The arms and legs are taped up to prevent the inmate from tampering with any "evidence." A break in the tape would reveal that the inmate tried to reach for something.

Richardson. When Ortiz began to tape Richardson's waistband, Richardson said he did not want to be on contraband watch and that he had two bindles. Ortiz asked what was in the bindles, and Richardson replied, "[W]eed." Richardson defecated one of the bindles, and the second bindle was recovered later in a hospital toilet after Richardson had used it. One of the bindles was later determined to have hashish inside, the other had marijuana inside.

DISCUSSION

I. Defendants' Statements to Officer Hernandez were not Made in the Course of an Interrogation; No *Miranda* Warnings were Required

Defendants argue their statements claiming ownership of the contraband at issue in count 1 were inadmissible because they were not *Mirandized*. (See *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).)

A. Background

In order to address the *Miranda* issues before trial, the court held a hearing under Evidence Code section 402.

Officer Hernandez testified at the hearing. He explained that defendants were escorted to the shower area of the prison while their cell was searched, for safety and security reasons. The shower area is four to five feet wide by six feet deep. It has a door with grill bars. Defendants were handcuffed at the wrists, also for safety reasons. Their feet were not shackled.

After the contraband was found in the cell, Officer Hernandez came to the shower area. Defendants had been there "maybe half an hour." The door to the shower area was closed. Hernandez told defendants bindles with suspected marijuana and a cell phone had been found in their cell. Right away, Richardson said the marijuana was his, and Vaughn said the cell phone was his.

Officer Hernandez testified he had not asked defendants any questions about the contraband. Hernandez did not tell the defendants contraband was found in order to elicit

a response such as, "That's mine," or "I don't know anything about that."[4] Rather, Hernandez told the defendants about the contraband to "avoid further questions by them while I'm escorting them up to the program office." It helps avoid confrontation when the inmates know why they are going to the program office and rehoused in administrative segregation.

The trial court ultimately ruled in favor of the prosecution and the defendants' statements were admitted.

B. Analysis

a. Two Prongs of *Miranda*

" '*Miranda* requires that a criminal suspect be admonished of specified Fifth Amendment rights.' " (*People v. Whitfield* (1996) 46 Cal.App.4th 947, 953.) " 'But in order to invoke its protections, a suspect must be subjected to *custodial interrogation* ....' [Citation.]" (*Ibid.*) " 'Thus two requirements must be met before *Miranda* is applicable; the suspect must be in "custody," and the questioning must meet the legal definition of "interrogation." ' [Citation]."[5] (*Ibid.*)

The Attorney General argues that neither requirement was met here. We conclude defendants did not make the statements during an "interrogation" and therefore do not reach the issue of whether the interaction was "custodial" under *Miranda*.

b. Defendants were not Subjected to an Interrogation

Not all statements made after the defendant is taken into custody are considered the product of interrogation. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 299.) An

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[4] Hernandez testified that he "always" would tell inmates when contraband was found in their cell. Hernandez was then asked, "[W]hen you always do that, does the person you're talking to usually respond to you and say either I don't know anything about that or yeah that's mine?" Hernandez responded, "I'd say 50/50."

[5] The fact that defendant is incarcerated is not dispositive of the "custodial" prong. (See *Cervantes v. Walker* (9th Cir. 1978) 589 F.2d 424, 427–429.)

interrogation occurs when a person in custody is subjected to either express questioning or its functional equivalent.[6] (*Id.* at pp. 300–301.)

Here, defendants were not subjected to either express questioning or a functional equivalent. Officer Hernandez simply explained what had been found in defendants' cell. Hernandez essentially testified that he informed the defendants of the discovery of contraband, so they would know why they were being taken to the program office and administrative segregation. Hernandez did not ask the defendants any questions.[7] Yet, they voluntarily claimed ownership of the contraband.

We find instructive the opinion in *U.S. v. Payne* (4th Cir. 1992) 954 F.2d 199 (*Payne*). In that case, the defendant was arrested[8] and subsequently driven between two cities by several FBI agents. (*Id.* at pp. 199, 201.) During the ride, an FBI agent told the defendant, " 'They found a gun at your house.' " (*Id.* at p. 201.) The defendant replied, " 'I just had it for my protection.' " (*Ibid.*)

The Court of Appeal held the defendant's statement had not been made during an interrogation. The appellate court observed that the FBI agent's statement " 'was not one that sought or required a response.' " (*Payne, supra*, 954 F.2d at p. 203.) Nor was the

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[6] Thus, " 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis, supra*, 466 U.S. at p. 301, fns. omitted.)

[7] This case is different from *People v. Davis* (2005) 36 Cal.4th 510 (*Davis*), cited by Richardson, where law enforcement *asked* defendant, " 'Alright remember that Uzi?' " (*Id.* at p. 553.) !(RAOB 28)!

[8] In *Payne*, the defendant was initially *Mirandized* and invoked his right to counsel. (*Payne, supra*, 954 F.2d at p. 201.) However, "interrogation as well as reinterrogation following an invocation of rights" are both defined as "express questioning and its 'functional equivalent.' [Citation.]" (*People v. Sims* (1993) 5 Cal.4th 405, 440, parentheses omitted.) Thus, while *Payne* was apparently looking at whether the FBI agent's conduct constituted a *re*interrogation, we do not see that as materially different from determining whether there was an initial "interrogation" here.

defendant " 'subjected to compelling influences, psychological ploys, or direct questioning.' [Citation.]" (*Ibid*.)

Similarly, Officer Hernandez's statement to defendants did not seek or require a response. Nor were defendants otherwise subjected to ploys[9] or questioning. We conclude their statements were not made during an interrogation and, therefore, *Miranda* warnings were not required.

II. The Trial Court did not Abuse its Discretion in Declining to Sever Trial of Counts One and Two

Before trial began, defendants moved to sever the trial of counts one and two. The trial court denied the motion.

A. Law of Severance

A trial court, "in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately …." (§ 954.)

Where joinder is proper under section 954, " '[t]he burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried.' [Citation.]" (*People v. Gomez* (2018) 6 Cal.5th 243, 275.) "In determining whether a court abused its discretion in declining to sever properly

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[9] Thus, *People v. Harris* (1989) 211 Cal.App.3d 640, cited by Vaughn, is not on point because it involved a law enforcement officer making a "prodding" invitation for the defendant to discuss the crime.

And, in *People v. Sims*, *supra*, 5 Cal.4th 405, the law enforcement officer "indirectly accused defendant of personally shooting the victims." (*Davis*, *supra*, 36 Cal.4th at p. 554–555.) Here, Officer Hernandez merely informed defendants of what had been found so that they would know why they were being taking to the program office.

Richardson argues in this reply brief that the "atmosphere" of the encounter "undermine[d]" his will to resist and compelled him to speak. We disagree with this characterization.

joined charges, we first consider 'the cross-admissibility of the evidence in hypothetical separate trials.' [Citation.]" (*Ibid*.) "If the evidence is cross-admissible, then this 'is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges.' [Citation.]" (*Id*. at pp. 275–276.) If not, joinder may still be appropriate. The court should consider several factors, such as whether any of the charges are unusually likely to inflame the jury, a weak case is being joined with a strong case or with another weak case, or any one of the charges carries the death penalty or joinder would turn the matter into a capital case. (*Ibid*.)

"In reviewing this claim, we apply the familiar standard of review providing that the trial court's ruling may be reversed only if the court has abused its discretion. [Citations.]" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315 (*Bradford*).) "An abuse of discretion may be found when the trial court's ruling ' "falls outside the bounds of reason." ' [Citation.]" (*Ibid*.)

We conclude that the trial court reasonably determined that cross-admissible evidence would likely be adduced at a joint trial, and therefore did not abuse its discretion in denying the request for severance.[10]

Cross-admissibility is when "evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others." (*Bradford, supra*, 15 Cal.4th at pp. 1315–1316.) Consequently, the question here is whether evidence of count 1 (relating to the contraband found in the joint prison cell) would have been admissible under Evidence Code section 1101 in a separate trial on count 2 (Richardson's possession of contraband in his rectum), and vice-versa.

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[10] "Having concluded that the trial court correctly determined the issue of cross-admissibility, we need not analyze the other factors …." (*Bradford, supra,* 15 Cal.4th at p. 1317.)

B. Admissibility of Evidence Under Evidence Code Section 1101

Evidence Code section 1101 generally renders inadmissible evidence of a person's character when offered to prove his or her conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) However, evidence that a person committed an uncharged crime is admissible when offered to prove a fact like "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident," etc., rather than to prove the person's "disposition to commit" such an act. (Evid. Code, § 1101, subd. (b).)

C. Application

Here, both counts charged violations of section 4573.6, which prohibits any person from "knowingly" possessing certain controlled substances, drug paraphernalia, etc. (§ 4573.6, subd. (a).) The fact that Richardson possessed marijuana on one occasion is relevant to a charge that he possessed marijuana on a different occasion because it raises the inference the subsequent possession was "knowingly" done. That is, the uncharged possession raises the inference that Richardson would have known marijuana is a controlled substance that was illegal to possess in prison. Such evidence is admissible under Evidence Code section 1101[11] because it goes to "knowledge" rather than criminal disposition. Because the evidence of each count would have been admissible in a separate trial on the other, cross-admissibility is established. The court was within its discretion to deny severance on that basis.

III. There was Sufficient Evidence of Constructive Possession to Support Vaughn's Conviction

Vaughn argues there was no substantial evidence supporting his conviction on

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[11] Richardson argues that the evidence of one prison possession nine months apart from another prison possession would have been excluded in a separate trial under Evidence Code section 352. But the question on cross-admissibility centers on Evidence Code section 1101. Other concerns, like the potential for undue prejudice, etc., are addressed by the other severance factors. However, those factors only come into play when cross-admissibility under Evidence Code section 1101 is not established.

count 1.

A. Substantial Evidence Review

"In evaluating a claim regarding the sufficiency of the evidence, we review the record 'in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citation.]" (*People v. Westerfield* (2019) 6 Cal.5th 632, 713.) " 'The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence.' [Citations.] 'We presume in support of the judgment the existence of every fact the trier of fact reasonably could infer from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.' [Citation.]" (*Ibid*.)

B. Elements of Section 4573.6

The elements of violating section 4573.6 as charged here are (1) that the defendant possessed a substance in prison; (2) defendant knew he possessed the substance; (3) defendant knew the substance was a controlled substance and (4) that the substance was in a "usable amount." (See *People v. Berg* (2018) 23 Cal.App.5th 959, 964, citing *People v. Carrasco* (1981) 118 Cal.App.3d 936, 944–948.) Vaughn argues there was insufficient evidence of the possession element.

C. Possession Element

Possession of a narcotic can be physical or constructive. (See *People v. Newman* (1971) 5 Cal.3d 48, 52, disapproved on other grounds by *People v. Daniels* (1975) 14 Cal.3d 857, 862.) "Constructive possession occurs when the accused maintains control or a right to control the contraband; possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused

and another. [Citation.] The elements of unlawful possession may be established by circumstantial evidence and any reasonable inferences drawn from such evidence. [Citation.]" (*Ibid.*)

D. Application

Here, the contraband was found in a cell occupied only by Vaughn and Richardson, right next to Vaughn's cell phone. Thus, the contraband "found in a place which [was] immediately and exclusively accessible to [Vaughn] and subject to … the joint dominion and control of [Vaughn] and another [i.e., Richardson]." (*People v. Newman, supra,* 5 Cal.3d at p. 52.) Therefore, constructive possession "may be imputed" to Vaughn. (*Ibid.*)

Vaughn fights this straightforward conclusion by pointing out other possibilities. For example, Vaughn notes that the narcotics could have been put down after Vaughn placed his cell phone there, or that Vaughn might not have noticed the bindles when he placed his cell phone there. Vaughn also implies that Richardson could have strong-armed him into an unfair sharing agreement whereby Richardson controlled most or all of the locker space in the cell. Additionally, Richardson admitted the narcotics were his, but Vaughn only admitted the cell phone was his. But these considerations are irrelevant under out standard of review. Since substantial evidence supported a finding that Vaughn constructively possessed the narcotics, it is irrelevant that some evidence would have supported a contrary finding. " 'If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.' [Citation.]" (*People v. Westerfield, supra*, 6 Cal.5th at p. 713.)

IV. One of Richardson's Strikes Must be Dismissed; the Court did not Err in Refusing to Dismiss Additional Strikes

The court found that Richardson had suffered three prior strike convictions: (1) a May 6, 2003, conviction for robbery; (2) a February 11, 2010, conviction for attempted murder; and (3) a February 11, 2010, conviction for assault with a deadly weapon.

Before sentencing, Richardson filed a *Romero* motion, requesting that the court strike two of his strike priors. Defendant argued that he was convicted of the "extremely minor felony" of possessing marijuana in prison, which is no longer a crime. The prosecutor opposed the request, emphasizing defendant's criminal history.

A. Concession

The Attorney General concedes that one of the strikes should be dismissed. We accept the concession.[12] The robbery and attempted murder strikes were based on the same act against the same victim. (See *People v. Richardson* (Nov. 14, 2011, B225327) [nonpub. opn.].) Therefore, one of them must be dismissed. (*People v. Vargas* (2014) 59 Cal.4th 635, 638–639.)

However, the parties still disagree as to whether the court should have dismissed another one of Richardson's three strikes.

B. Trial Court Discretion and Appellate Review of Romero *Motions*

Sentencing courts have discretion to dismiss a "strike" (see generally *Romero, supra*, 13 Cal.4th 497), but that discretion is of a "limited nature." (*People v. Bonnetta* (2009) 46 Cal.4th 143, 153.) The court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit …." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) A sentencing court may not dismiss a strike " 'guided solely by a personal antipathy for

[12] This is the only error we find on appeal. Consequently, Richardson's claim of cumulative error is meritless.

the effect that the three strikes law would have on [a] defendant ….' " (*Romero*, *supra*, 13 Cal.4th at p. 531.)

We review a sentencing court's decision on a *Romero* motion for abuse of discretion. (*Romero*, *supra*, 13 Cal.4th at p. 532.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.)

C. The Trial Court's Comments do not Indicate it Misunderstood its Discretion

Richardson argues that comments made by the court at sentencing indicate that it was unaware of the scope of its discretion to dismiss Richardson's strikes.

At the hearing on the *Romero* motion, the prosecutor's entire argument centered around defendant's criminal history. Defense counsel noted that Richardson's first anticipated chance at parole would be when he was 73 years old.

The trial court ruled as follows,

> "Let me just share with you some comments by the Court on this issue. I did have a brief meeting with [the author of the probation report]. Again, thank you. It certainly considers [*sic*] some options in this case in terms of the overall picture, but in terms of where the Court got to in the end it came back to the issue that this happened in the state prison, which is – you all said it's just marijuana, et cetera, et cetera, but the problem is where it happened and so – and what it could mean and again we can't speculate that would be totally unfair against the defendant in and of itself. But the issue here is the situation has consequences as pointed out by [the prosecutor.] The gentlemen's record certainly puts us in the position we're in. It's not something that the court has done or anything like that. In addition, I would just like to comment to the two gentlemen during the trial. I would like to say that when I did read the reports in the case, it didn't reflect how they behaved throughout the trial in terms of these people, *so I'm saddened by what I read and it's just a fact of life and if I could have done it. I certainly would have done it but it is what it is at this point*, gentlemen, but your behavior, the way you work with your attorneys, the respect you had for the jury, everything, I can only commend you on that, but I have to do what I have to do as a judge within this case.

> "So with that, [defense counsel], good work on behalf of your client as usual. I've considered the [*Romero*] motion presented by the defense. There's no response in this case filed by the prosecution but certainly argued. I've considered current charges against the defendant. I did take in … I can certainly see a difference in terms of the place it happened. Defendant's criminal record, background, prospects. Here and again, I mentioned the 73. It's just sad. Just sad. In the interest of justice and at this time the Court finds the defendant not outside the spirits of the Three Strikes Law and denies the defense motion at this time." (Italics added.)

Richardson says the court's statements indicate it did not understand the scope of its discretion. We disagree. The court essentially related that while it was saddened or otherwise may have preferred a different outcome, it was still compelled to deny the motion because Richardson did not fall outside the spirit of the "Three Strikes" law. Contrary to Richardson's claim, these comments indicate the court properly understood that it could not dismiss a strike merely because it may have wanted to. A court may not rule on a *Romero* motion " 'guided solely by a personal antipathy for the effect that the three strikes law would have on [a] defendant ….' " (*Romero*, *supra*, 13 Cal.4th at p. 531.) The court's expression that it was "saddened" does not conflict with its decision that the "interest of justice" did not warrant dismissal of the strikes. The court's comments do not reflect a misunderstanding as to the scope of its discretion.

D. Court's Brief Mention of "Background" and "Prospects" Likely Referred to Criminal Record

Richardson next contends that the court's reliance on his "background" and "prospects" was improper because those factors are unsupported by the record. He says the "probation report contained no information about appellant's education, family, marital status, alcohol or drug use, health or any other information."

First, we note that the import of the court's reference to "background" and "prospects" was ambiguous. The Court said,

> "I've considered current charges against the defendant. I did take in … I can certainly see a difference in terms of the place it happened. *Defendant's criminal record, background, prospects*. Here and again, I

> mentioned the 73. It's just sad. Just sad. In the interest of justice and at this time the Court finds the defendant not outside the spirits of the Three Strikes Law and denies the defense motion at this time." (Italics added.)

Richardson's argument presumes that the court's reference to "background" and "prospects" concerned aspects of his past *other than* his criminal history. Given the prosecutor's argument concerning Richardson's *criminal* background, and defense counsel's observation that Richardson was already ineligible for parole until he was 73 years old, it seems more likely that the court was referring to defendant's "background" of criminal behavior and how the existing sentence arising from that history affects his "prospects" going forward.

E. Trial Court's Reliance on Richardson's Criminal History was Appropriate

Richardson argues the court's reliance on his criminal history, "considered in light of the minor nature of the current offenses," does not support the ruling. We disagree. Richardson was convicted of robbery (§ 211) in 2001 and 2003, possession of a controlled substance (Health & Saf. Code, § 11350) in 2006, possession of a firearm as a felon, assault with a deadly weapon, and attempted murder in 2009 (§§ 187, subd. (a), 664 & 245, subd. (a); former § 12021.) This is a substantial criminal history and the court was entitled to rely upon it heavily.

Richardson notes that in *People v. Garcia* (1999) 20 Cal.4th 490, the Supreme Court observed a sentencing court "might … be justified in striking prior conviction allegations with respect to a relatively minor current felony, while considering those prior convictions with respect to a serious or violent current felony." (*Id.* at p. 499.) We agree. And if the sentencing court in this case had chosen to dismiss one or two of Richardson's strikes because of the arguably "minor" nature of the present offense, we probably would have affirmed that decision as well.[13] But we cannot say the decision the court made

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[13] We readily acknowledge that Richardson's sentence is substantial in relation to the crime of possessing narcotics in prison. Indeed, we may have granted Richardson's

here was "so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony, supra*, 33 Cal.4th at p. 377.)

F. Location of Drug Possession not Sole Basis of Sentence

Richardson points to the trial court's concern that the drug possession in this case took place in a prison. He argues that this fact "alone" does not justify a 50-year-to-life sentence. We agree. But the sentence is not based on that fact alone – it is also based on Richardson's substantial criminal history.

V. Richardson's Sentence is not Cruel and Unusual under the State and Federal Constitutions

Richardson contends his sentence of 50 years to life in prison is cruel and unusual under the federal and state constitutions.[14]

Romero motion if we sat as a sentencing court. But even if we would have exercised our discretion differently, that does not mean the trial court abused its discretion by reaching another conclusion. " '[I]t is not enough to show that reasonable people might disagree about whether to strike one or more' " prior conviction allegations." (*People v. Carmony, supra*, 33 Cal.4th at p. 378.) If the sentencing court's decision is not arbitrary, capricious or manifestly absurd, we affirm that ruling " 'even if we might have ruled differently in the first instance.' " (*Ibid.*)

[14] Vaughn filed his opening brief before Richardson. Vaughn raised several issues and concluded by saying he "hereby joins in all issues not raised by himself but raised by co-appellant Terry Richardson which may accrue to appellant's benefit." Richardson subsequently filed his brief, which raised some overlapping issues, but also challenged his own sentence on the grounds that it was cruel and unusual. Vaughn did not file a reply brief.

Because Vaughn's joinder was made without knowing what arguments Richardson would present, it is unclear whether Vaughn believes he has a valid claim of cruel and unusual punishment. Even assuming Vaughn does wish to present a claim of cruel and unusual punishment, his joinder would not satisfy his burden on appeal. Analysis of such a claim – especially as it relates to recidivism and criminal history – is highly individualized. To the extent Vaughn would have wanted to raise a claim of cruel and unusual punishment, his reliance solely on Richardson's arguments and reasoning "is insufficient to satisfy his burden on appeal." (*People v. Nero* (2010) 181 Cal.App.4th 504, 510, fn. 11.)

The federal and state constitutions prohibit cruel and unusual punishment. (See U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) Under the federal constitution, "criminal sentence[s] must be proportionate to the crime for which the defendant has been convicted." (*Solem v. Helm* (1983) 463 U.S. 277, 290 (*Helm*).) Under the state constitution, a criminal sentence must not be "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted (*Lynch*).)

The government has a valid public safety interest in incapacitating and deterring recidivist felons. (*Gonzalez v. Duncan* (9th Cir. 2008) 551 F.3d 875, 886.) As a result, courts *must* consider the defendant's criminal history when determining whether a penalty is so severe as to violate the Eighth Amendment. (*Ibid*.) Criminal history is also a key consideration in determining whether the sentence violates the California Constitution. (E.g., *People v. Cooper* (1996) 43 Cal.App.4th 815, 825–826.) For example, our court has held the imposition of a 25-year-to-life term for a "nonviolent, nonserious felony" committed by a "recidivist offender … with at least 2 prior convictions for violent or serious felony is not grossly disproportionate to the crime." (*Cooper*, at p. 825.)

Under the state and federal constitutional analysis, substantial deference must be given to the Legislature's choice of punishment. "Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." (*Helm*, *supra*, 463 U.S. at p. 290, fn. omitted.)

> "Whether a particular punishment is disproportionate to the offense is, of course, a question of degree. The choice of fitting and proper penalties is not an exact science, but a legislative skill involving an appraisal of the evils to be corrected, the weighing of practical alternatives, consideration of relevant policy factors, and responsiveness to the public

> will; in appropriate cases, some leeway for experimentation may also be permissible. The judiciary, accordingly, should not interfere in this process unless a statute prescribes a penalty 'out of all proportion to the offense' [citations], i.e., so severe in relation to the crime as to violate the prohibition against cruel or unusual punishment." (*Lynch*, *supra*, 8 Cal.3d at pp. 423–424.)

A. Richardson's Sentence was not "Purposeless"

First, Richardson argues that his sentence makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering. (See *Coker v. Georgia* (1977) 433 U.S. 584, 592.)

Richardson argues that because he cannot be a danger to society after his death, a prison term that exceeds his life expectancy "does not serve to protect society through incapacitation." But the sentence clearly *does* protect society through incapacitation *before* Richardson's death.

Richardson says that "since the deterrent value of punishment lies in the defendant's fear of it, exposure to a prison term longer than life expectancy serve[s] no deterrent purpose." However, criminal sentences are not meant only to deter the specific defendant to whom they are applied, but to deter those who would commit the crimes in the future.

B. Richardson has not Established Disproportionality in light of Substantial Criminal History and Government's Legitimate Interest in Punishing and Incapacitating Recidivist Felons

Richardson also contends his punishment is cruel and unusual because it is "grossly disproportionate" to the crime he committed.

In *Lynch*, the Supreme Court identified several "techniques" for analyzing claims of cruel and unusual punishment. (*Lynch*, *supra*, 8 Cal.3d at p. 425.) The first involves "examin[ing] the nature of the offense and/or the offender …." (*Ibid*.)

With respect to the "nature of the offense" factor, Richardson emphasizes his current offenses are nonviolent. With respect to the "nature of the offender" factor, Richardson simply notes he was already serving a substantial prison sentence and "had no meaningful opportunity to re-enter society." However, that is not the only consideration with respect to the nature of the offender. As recounted above, Richardson has a substantial criminal history. Richardson was convicted of robbery (§ 211) in 2001 and 2003, possession of a controlled substance (Health & Saf. Code, § 11350) in 2006, possession of a firearm as a felon, assault with a deadly weapon, and attempted murder in 2009 (§§ 187, subd. (a), 664 & 245, subd. (a); former § 12021.) While a 50-year-to-life sentence would likely be too severe a punishment for marijuana possession in prison, Richardson "was punished not just for his current offense but for his recidivism" as well. (*People v. Cooper*, *supra*, 43 Cal.App.4th at p. 825.) Because of his substantial criminal history, Richardson's sentence is not so disproportionate that it "shocks the conscience" under the California standard (*Lynch*, *supra*, 8 Cal.3d at p. 424) or violates the federal constitution's requirement that a sentence be proportionate to the crime (*Helm*, *supra*, 463 U.S. at p. 290).

This conclusion comports with a line of cases from the Supreme Court. In *Rummel v. Estelle* (1980) 445 U.S. 263, the Supreme Court upheld a sentence of life in prison for the crime of obtaining $120.75, by false pretenses. In *Helm*, *supra*, 463 U.S. 277, the Supreme Court reversed a life sentence imposed for the crime of passing a "no-account" check. In *Lockyer v. Andrade* (2003) 538 U.S. 63, the Supreme Court upheld an aggregate 50 years to life sentence under the Three Strikes law for stealing videotapes from stores on two occasions.[15] In *Ewing v. California* (2003) 538 U.S. 11 (*Ewing*), the

[15] The question before the court in *Lockyer* was whether the Ninth Circuit erred in concluding the California Court of Appeal's decision upholding the sentence was "contrary to, or an unreasonable application of, clearly established federal law as determined by [the Supreme Court] within the meaning of 28 U.S.C. § 2254(d)(1)." (*Lockyer, supra,* 538 U.S. at p. 66.)

Supreme Court upheld a 25-year-to-life sentence under the Three Strikes law for stealing three golf clubs.[16]

As these cases reflect, the Eighth Amendment permits substantial sentences for arguably "minor" crimes where the defendant is a recidivist. Certainly, *Helm*, *supra*, 463 U.S. 277, illustrates that there is a limit to how much can be justified by recidivism concerns. But we cannot say that the sum of Supreme Court case law in this area mandates reversal here.[17]

C. Comparative Analysis not Warranted

Lynch identified other "techniques" for considering claims of cruel and unusual punishment, including: (1) "compar[ing] the challenged penalty with the punishments prescribed in the *same jurisdiction* for *different offenses*" (i.e., intra-jursidictional comparative analysis); or (2) "compari[ng] … the challenged penalty with the punishments prescribed for the *same offense* in *other jurisdictions*" (i.e., inter-jurisdictional comparative analysis.) (*Lynch*, *supra*, 8 Cal.3d at pp. 426–427.) However, such analyses are appropriate *only* in the rare case in which comparison of the crime to the sentence leads to an inference of gross disproportionality. (*Taylor v. Lewis* (9th Cir. 2006) 460 F.3d 1093, 1098, fn. 7.) As the lead opinion stated in *Ewing*:

> "To be sure, [defendant's] sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated. The State of California 'was entitled to place upon [defendant] the onus of one who is simply unable to bring his conduct

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[16] No opinion in *Ewing* garnered five votes. However, a majority of the justices concluded the sentence did not constitute cruel and unusual punishment. The California Supreme Court has followed *Ewing*. (*In re Coley* (2012) 55 Cal.4th 524, 531.)

[17] Richardson also cites to two United States District Court cases, which we find unpersuasive. (See *Banyard v. Duncan* (2004) 342 F.Supp.2d 865, 875 ["The crime of possessing a use quantity of drugs is committed on a regular basis by countless otherwise law-abiding citizens, without any significant feeling of moral culpability"]; *Duran v. Castro* (E.D. Cal.2002) 227 F.Supp.2d 1121.)

> within the social norms prescribed by the criminal law of the State.' [Citation.] [Defendant's] is not 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.' [Citation.]" (*Ewing, supra*, 538 U.S. at p. 30, (lead opn. of O'Connor, J.).)

D. Conclusion

While possession of marijuana alone would likely not justify Richardson's sentence, "the State's public-safety interest in incapacitating and deterring recidivist felons" does. (*Ewing, supra*, 538 U.S. at p. 33 (lead opn. of O'Connor, J.), fn. omitted.) Consequently, we reject Richardson's claim.

DISPOSITION

The matter is remanded for the trial court to dismiss *one* of Richardson's prior strike enhancements relating to the 2010 convictions for attempted murder and assault with a firearm. The judgment against Richardson is otherwise affirmed. The judgment against Vaughn is affirmed in its entirety.

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POOCHIGIAN, Acting P.J.

WE CONCUR:

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SMITH, J.

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MEEHAN, J.